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By. of Taggart & Masten for Pl. in Err.

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Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 77

THE TEXAS AND PACIFIC RAILWAY COMPANY,
Plaintiff in Error,

vs.

EMIL REISS, JAMES EDWARD REISS, FREDERICK REISS and HENRY JACQUES REISS,
Defendants in Error.

Brief of Texas and Pacific Railway Company.

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Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 307.

THE TEXAS AND PACIFIC RAILWAY COMPANY,
Plaintiff-in-Error,

vs.

EMIL REISS, JAMES EDWARD REISS, FREDERICK REISS and HENRY JACQUES REISS,
Defendants in Error.

Statement of the Case.

This case comes into this Court by writ of error from the Circuit Court of Appeals of the Second Circuit, which affirmed the judgment entered in favor of the defendants in error rendered upon a verdict of a jury directed by the Circuit Court of the United States for the Southern District of New York.

The action in the Circuit Court was brought to recover the value of cotton burned at Westwego, in the State of Louisiana, on the night of the 12th of November, 1894. This cotton had been shipped from

Temple, Texas, on the Missouri, Kansas and Texas Railway, to be carried over that railway, the railway of the defendant the Texas and Pacific Railway, to New Orleans, and from New Orleans to Bremen, Germany. These two lines of railway and the steamship line made up the total route of carriage for this action.

The method of handling this cotton at Westwego had been considered by this Court, and is in general very accurately stated in the case of the Texas and Pacific Railway Company vs. Clayton, 173 U. S., 352, 353, and, as described in that case, was as follows :

" The mode in which the railway company and the steamship company transacted business was as follows : Upon the shipment of cotton, bills of lading would be issued in Texas to the shipper. Thereupon the cotton would be loaded in the cars of the railway company and a way bill indicating the number and initial of the car, the number of the bill of lading, the date of shipment, the number of bales of cotton, the consignor, the consignees, the date of the bill of lading, the number of bales forwarded on that particular way bill, the marks of the cotton, the weight, rate, freights, amount prepaid, etc., would be given to the conductor of the train bringing the car to Westwego. Upon the receipt of the way bill and car at Westwego, a 'skeleton' would be made out by the clerks at that place for the purpose of unloading the car properly. It contained the essential items of information covered by the way bill, and had also the date of the making of the skeleton. When this skeleton had thus been made out and the car had been pushed in on the side track in the rear of the wharf, it would be taken by a clerk known as a 'check clerk,' and with a gang of laborers, who actually handled the cotton and were employed by the railway company, the car would be opened, and as the cotton was taken from the car bale by bale the marks would be examined to see that they corresponded with the items of the skeleton, and the same were then

checked. The cotton thus taken from the car was deposited at the place on the wharf designated by the check clerk, and it would remain there until the steamship company came and took it away. After the checking of the cotton in this way to ascertain that the amounts, marks and general information of the way bill were correct, the skeleton would be transmitted to the general office of the Texas and Pacific Railway Company in New Orleans which would thereupon make out what was designated as a 'transfer sheet' that contained substantially the information contained in the way bill, and which being at once transmitted to the steamship company or its agents, was a notification understood by the steamship company's agents that cotton for their line was on the wharf at Westwego ready for them to come and take away. Upon the receipt of these transfer sheets the steamship company would collate the transfers relating to such cotton as was destined by them for a particular vessel, advise the railway company with the return of the transfers that this cotton would be taken by the vessel named, and would thereupon send the vessel with their stevedores to the wharf at Westwego. The clerk at Westwego would go around the wharf and by the aid of the transfers returned from the steamship agents point out to the master or mate of the vessel or the one in charge of the loading the particular lots of cotton named in the transfers and designated for his vessel, and the stevedores and their helpers would thereupon take the cotton and put it on board the ship. In connection with the loading upon the vessel or after the cotton was pointed out in lots, the master or mate would sign a mate's receipt for this cotton. The stevedores and all men employed in loading the vessel were wholly in the employ of the steamship company. The time of coming to take the cotton from the wharf was entirely within the control of the steamship company. They sent for it as soon as they were ready."

This statement of the method of dealing between the steamship company and the Texas and Pacific Railway Company should be supplemented by the additional fact alluded to in the opinion of the Circuit Court of Appeals (but not correctly stated in the opinion), to the effect that it was customary for the

steamship company to send a steamer to Westwego and get cotton without returning the transfer sheets. This is erroneously stated, as I have said, in the Circuit Court of Appeals opinion, as a practice which had grown up since the fire. This statement of the opinion is contrary to the evidence which is found in the testimony of Mr. Wilkinson (p. 38) as follows:

Q. What other method was there in the custom of doing business there?

A. I would frequently get a telephone message what ship would be there and to give her what she would take. I would also have a stevedore that was handling cotton come in and say, "I will just take all this." Then they would just jam in everything if the bill of lading was complete. By saying if the bill of lading was complete, I mean, for instance, F 43 from Temple calls for 200 bales of cotton split up into four or five or six lots, we would not consider that bill of lading complete until all that cotton had arrived there ready for delivery. Unloaded on the wharf ready or the cars so that we could put it right to them. We received those telephone communications from the New Orleans office, and we also received them from the steamship agent asking me to give them the cotton. From Elder, Dempster & Company I would receive the communications by telephone, with no relation to a communication of this sort, pretty near as often as I would get one of those memorandums.

"Q. Have you ever had any talk with any representative of Elder, Dempster & Company respecting the giving of cotton to a ship that had room for it, where the bills of lading were complete, without regard to the question of whether the transfer or skeletons had been forwarded from Westwego?

"A. I have had with the senior Mr. Warriner, the agent of Elder, Dempster & Company, and with Mr. Powers, their head stevedore. Mr. Warriner said on that subject to give them all she could take, that is where the bills of lading were complete; of course, we would not make delivery unless the bills of lading were complete. I had that conversation over the telephone and I have had it on the wharf with the stevedore."

The other testimony upon the subject, that which the Circuit Court of Appeals must have relied upon is that of Mr. Warriner, who testifies at page 33 as follows:

"Q. Mr. Miller has testified, as I understand him, that there was a practice of loading cotton on your ships at Westwego for which he had received no regular transfers from your office; do you know of such a practice?

"A. The practice has been more general since the fire than before. It was not the practice before, according to my recollection. We are prepared to take any cotton at any time that we have room for, receive it when it is delivered to the ship and sign for it in the same way."

Mr. Miller also testified (pp 14 and 15):

"Q. What was the method practiced with reference to giving steamers cotton not named in the transfers returned to the office in case there was capacity in the vessel to receive it?

"A. The practice was to give the steamships all the cotton they would receive and take on board, regardless of whether the cotton was covered by the regular transfer orders or not."

Westwego was situated on the west bank of the Mississippi River, at a point opposite the upper portion of the City of New Orleans. A branch track from the main line of the Texas and Pacific led off to the bank of the river, and on the bank of the river was situated a large cotton wharf which extended out over the water, so that vessels could come up to the side of the wharf and load cotton which had been deposited upon the wharf. The tracks of the Texas and Pacific Railway were conducted along the rear of the wharf and sufficiently depressed below the platform of the wharf so that the floor of the cars would be upon a level with the top of the wharf. There was also at

this point, some little distance from the wharf, a large elevator for the handling and storing of grain and a conveyor from the elevator to a loading point below the wharf at which the grain could be loaded into ocean vessels.

For several years prior to the date of the fire this had been the recognized place of delivery by the Texas and Pacific Railway Company of export cotton to the various steamship lines coming to New Orleans. After the construction of this wharf in 1892, the delivery of export cotton by the Texas and Pacific Railway Company at any other point to steamship lines for carriage to Europe had almost entirely ceased. Westwego was not within the limits of the Customs District of New Orleans, as defined by Act of Congress.

In the case at bar the course of business above outlined was followed. The cotton involved in this case arrived at Westwego on the 5th and 6th of November and was unloaded on the 6th of November. The regular course of business was followed with respect to this cotton. It was located at the place on the wharf where it was to remain until the steamship would come for it, but no notification by the sending of transfer sheets had been given to the steamship company at the time of the fire.

The bill of lading, under which the cotton was shipped, was issued by the Missouri, Kansas and Texas Railway Company, and is expressed to be on behalf of the Missouri, Kansas and Texas Railway Company of Texas, and the Texas and Pacific Railroad and the Elder, Dempster Co. S. S. Line. The provisions of this bill of lading are materially different from those considered in the Clayton case.

The material parts of this bill of lading are the following:

"Conditions with respect to the service until delivery at the Port of New Orleans, La. It is agreed that * * *

"(3) No carrier shall be liable for loss or damage not occurring on its own road or its portion of the through route nor after said property is ready for delivery to the next carrier or to consignee. The amount of any loss or damage for which any carrier becomes liable shall be computed at the value of the property at the place and time of shipment under this bill of lading, unless a lower value has been agreed upon or is determined by the classification upon which the rate is based, in either of which events such lower value shall be the maximum price to govern such computation. Claims for loss or damage must be made in writing to the agent at point of delivery promptly after arrival of the property, and if delayed for more than thirty days after the delivery of the property or after due time for the delivery thereof, no carrier hereunder shall be liable in any event. * * *

"(11) No carrier shall be liable for delay nor in any other respect than as Warehousemen while the said property awaits further conveyance, and in case the whole or any part of the property specified herein be prevented by any cause from going from said port in the first steamer of the ocean line above stated leaving after the arrival of said property at such port, the carrier hereunder then in possession is at liberty to forward said property by the succeeding steamer of said line or if deemed necessary by any other steamer.

"(12) This contract is executed and accomplished and all liability hereunder terminates on the delivery of the said property to the steamship, her master, agent, or servants or to the steamship company or on the steamship pier at the said port; and the inland freight charges shall be a first lien due and payable by the steamship company" (Record, pp. 79, 80, 81).

This case was tried in the Circuit Court, and upon the first trial the trial Court was of the opinion that, under the provisions of the first part of the 11th clause the defendant railway company held the property at

the time of the fire as a warehouseman, because it was awaiting "further conveyance," and there being no proof of negligence a verdict was directed for the defendant.

Judgment was entered upon this verdict.

The plaintiffs below carried the case to the Circuit Court of Appeals upon writ of error, which reversed the judgment, upon the ground that inasmuch as notification of the arrival of the cotton at Westwego had not been given to the steamship company, the property was not awaiting "further conveyance" within the meaning of the 11th clause of the bill of lading, and sent the case back for a new trial. The opinion of the Court upon this appeal may be found in 98 Federal Reporter, 533.

Upon the retrial of the case, there being no change in this particular in the testimony, the trial Court directed a verdict in favor of the plaintiffs for the value of the cotton. Writ of error was taken to the Circuit Court of Appeals by the defendant below, and the judgment was affirmed on the opinion rendered upon the former trial (Record, p. 110). The defendant railway company brings the case to this Court, making the following assignments of error.

I.

That the said Circuit Court of Appeals erred in affirming the judgment of the Circuit Court rendered against The Texas and Pacific Railway Company, plaintiff in error, and in favor of the defendants in error upon the trial of said cause.

II.

That the said Court erred in holding that the Circuit Court committed no error in denying the motion of the Texas and Pacific Railway Company upon the trial of said action to direct a verdict in its favor when the defendants in error rested their case.

III.

That the said Court erred in holding that the Circuit Court committed no error in directing a verdict in favor of the defendants in error upon the trial of said cause.

IV.

That the said Court erred in holding that the Circuit Court committed no error in denying to the said The Texas and Pacific Railway Company the right of going to the jury upon the question of fact that at the time this property was destroyed it was awaiting further conveyance.

V.

That the said Court erred in affirming the action of the Circuit Court in refusing to allow The Texas and Pacific Railway Company upon the trial of said cause to go to the jury upon the question of fact that the property was ready for delivery to the next connecting carrier or to consignee.

ARGUMENT.

I.

The cotton involved in this suit was subject to the provision of the 11th clause: "No carrier shall be liable for delay nor in any other respect than as warehouseman, while the said property awaits further conveyance."

This bill of lading is divisible into two distinct parts, which amount to separate and distinct contracts (Liverpool Co. vs. Phœnix Ins. Co., 129 U. S., 397). The first twelve conditions named relate to service until delivery at the port of New Orleans. The remaining fifteen relate to service after the delivery at the port of New Orleans, and inasmuch as the conditions of the service are entirely distinct and separate, each must be looked to separately to discover the meaning of the contract between the parties. The Circuit Court of Appeals was of the opinion that clause 11 could not apply so long as no notice had been given to the connecting carrier, and says:

"The language is too indefinite to support a conclusion that notice to the connecting line was not a prerequisite to the change of liability to that of a warehouseman. It may well be that such change would take place when the property was awaiting conveyance by the connecting line which had been notified to receive and convey, but until then it is not awaiting conveyance; it is awaiting the action of the first carrier. The term must mean awaiting conveyance by the person upon whom the duty of conveyance devolved, and no such duty devolved until notice of the arrival of the property had been given."

But we submit that this is a begging of the whole

question and does not construe this paragraph of the bill of lading in the light of all the other clauses relating to the service until delivery at the port of New Orleans. Thus, clause 3 provides that:

"No carrier shall be liable for loss or damage not occurring on its own road or its portion of the through route, nor after said property is ready for delivery to the next carrier or to consignee."

Paragraph 12 provides that:

"This contract is executed and accomplished and all liability hereunder terminates on the delivery of the said property to the steamship or master, agent or servant, or to the steamship company or on the steamship pier at the said port."

Evidently Section 11 is intended to apply to a different condition of affairs from that provided for in paragraphs 3 and 12. Under the facts in this case it is undisputed that this wharf at Westwego, under the practice and under the express agreement with the steamship company, the connecting carrier in this case, was the place of delivery of this cotton to the steamship company. Westwego was the terminus of the railway company at which the steamship company had agreed to receive this cotton, and as is conceded in the opinion of the Circuit Court of Appeals the duty of the steamship company to receive and convey would arise upon notice of the arrival of the property upon this wharf. If that is the case the uncontradicted fact is that this cotton was unloaded and deposited upon the wharf at the place where it would remain until the steamship company would come and take it away. Its duty thus to come and take it away, under the opinion of the Circuit Court of Appeals, only depended upon the reception

of a notice that it was thus located upon the wharf. Upon the giving of such notice, the provision of Section 3 would have perfect application, because clearly the property would be "ready for delivery to the next carrier." The Texas and Pacific Railway Company would, upon the case supposed, have carried the property over its own route and at the end of the route would have unloaded it, and deposited it in the place agreed upon with the connecting carrier, and upon giving the notice would have done all it could do except to deliver to the next carrier. Even if the position taken in the opinion of the Circuit Court of Appeals, that the decision in the Clayton case goes to the extent that such action would not amount to delivery to the connecting carrier (a position which we do not concede by any means), yet it seems to us incontrovertible that the railway company would be in the position of having fully discharged its duty up to the point of actual delivery and that it must be deemed to hold the cotton "ready for delivery to the next carrier." Under Section 3 of the bill of lading this would be a termination of its liability because the contract of the parties as contained in paragraph 3 expressly releases the carrier from liability for loss or damage "after said property is ready for delivery to the next carrier." On the first trial the trial Court intimated a doubt as to the validity of this stipulation of paragraph 3, but the decision of this Court in Constable vs. Steamship Co. (154 U. S., 51), is an express authority in favor of the entire validity of a stipulation in a bill of lading defining the cessation of liability much more strictly in favor of the carrier than in the case at bar.

The opinion of the Circuit Court of Appeals discusses the absence of notice and its effect upon the relations of the parties under paragraph 11, precisely as though the question were whether the provisions of paragraph 3 or paragraph 12 applied. The provisions of the bill of lading in this case are so different from those of the Clayton case that the language quoted from that case is entirely inapplicable to this case. In that case, there was the express provision that the carrier in whose "actual custody" the cotton was should be liable in case of fire. By that clause, any question of constructive delivery to the connecting carrier was expressly excluded, as this Court says in the opinion. But in this case the very opposite condition is expressly stipulated for in the bill of lading, and paragraphs 3 and 12, we submit, are intended to cover such a case as we would have in the case at bar had notice been given to the steamship company of the arrival of the cotton at Westwego, which notice would be understood by the steamship company as a request to come and take away the cotton. Now, it is precisely such a condition which the Circuit Court of Appeals decides must exist to allow the provisions of paragraph 11 to have application and effect, although it is very evident, upon an inspection of the bill of lading, that they were not intended to cover the same conditions or class of facts.

If we are right in this view of the application and scope of paragraphs 3 and 12 of the bill of lading, then it is evident that in inserting paragraph 11, which does not provide for entire cessation of liability, but simply for a modified liability under certain conditions, then the parties must have been stipulating for something not provided for in paragraph 3, and we must find a

condition of things to which paragraph 11 may attach not covered by paragraphs 3 or 12. Under paragraphs 3 and 12 the liability entirely terminates under the conditions named when the one carrier has entirely performed its duty to the cotton, and has in the one case the cotton ready for delivery, and in the other case, when it has been delivered as in paragraph 12 set forth. Paragraph 11 seems to contemplate an entirely different situation of affairs, and that is, the settlement of the question, first, of liability for delays in this transportation, and then, second, and connected with the matter of delay, of which the carrier is relieved, was the question of the extent of liability of the carrier during the deposit of the property at terminal points, pending the doing of the very things that are described in the course of business at Westwego, viz., the making out of the proper records of the receipt of the property; the forwarding of such records to the connecting carrier as notice to such connecting carrier, and the connecting carrier's use of such records, and making proper arrangements thereafter for the receipt by it of the property, and its further carriage, during all of which the property is in a position where it may be considered as exposed to greater dangers than when in the course of continuous carriage. In view of such delays, and the contingencies incident thereto, which were liable to occur on a through shipment like this, composed of several dependent rail lines and steamship lines, which might be prolonged more or less by reason of the very things which occurred at and about New Orleans in connection with this case, these parties stipulated in paragraph 11, not for an entire cessation of liability, as in paragraphs 3 and 12, but that the carrier which had the custody of this property pending

negotiation to its connecting carrier should, after the actual carriage should be furnished, and while, as a matter of fact, "the said property awaits further conveyance," should be subject to the limited liability of a warehouseman; that is, while the property is at the point of transhipment, either in the car awaiting its removal therefrom to be deposited in another car of a connecting carrier, or in the steamboat of a connecting carrier, or in the ocean steamship, or while it is upon the wharf awaiting the arrival of the ocean steamship to be further carried toward its ultimate destination, or while the carrier who has brought it there, completing its portion of the carriage, is making the proper notification record, and account of said property that that property shall be in its possession not with the unlimited, absolute liability of an insurer, but with the limited liability of a warehouseman.

The term "further conveyance" in the bill of lading has evident reference to something different from "delivery" in the third clause of the bill. It is the equivalent of carriage, and is as though the bill of lading read "while the property awaits further carriage." That is, the carriers from Temple, Texas, to New Orleans, each were entitled to the benefit of this clause when the property in the possession was awaiting "further carriage." It refers to the status of the property with reference to the physical act of carriage or transportation, not with respect to the legal relations of the property to one or the other of the parties successively called upon to engage in this physical act. This latter relation is fully determined by the question of whether there has been delivery or not made by one or the other, and this again may depend upon the question of notice from one to the other. But not

so with the question of "further conveyance," *i. e.*, transportation, carriage. Under the testimony in this case it is unquestioned that no act of further carriage or conveyance was to be made by the Texas and Pacific Railway Company. All that is suggested in the opinion of the Circuit Court of Appeals is that notice should be given to the connecting carrier. But that would not be an act of "conveyance," transportation, carriage of the property. The transportation was complete so far as the Texas and Pacific Railway Company was concerned. Its only further duty to the property was its delivery to the next carrier.

"Delivery": In contracts the transfer of the possession of a thing from one person to another.

Originally, delivery was a clear and unequivocal act of giving possession, accomplished by placing the subject to be transferred in the hands of the transferee or his avowed agent, or in their respective warehouses, vessels, carts and the like; but in modern times it is frequently symbolical, as by the delivery of the key to a room containing goods: (5 Johns., 335; 1 Yeates, 529; 2 Ves. Sen., 445; 1 East, 192; see, also, 7 East, 558; 3 B. & P., 233; 158 Mass., 592;) by marking timber on a wharf, or goods in a warehouse, or by separating and weighing or measuring them (2 Vt., 374; 40 N. J. L., 581; 69 Md., 537;) or otherwise constructive, as by the delivery of the part for the whole (23 Vt., 265; 9 Barb, 416; 11 Cush., 282; 39 Me., 496; 3 B. & P., 69). And see, as to what constitutes a delivery, 4 Mass., 661; 71 N. Y., 291; 89 Ill., 218; 89 Va., 1; 90 Tenn., 306; 74 Ia., 506; 1 Q. B., 582.

And the notice which the Circuit Court of Appeals dilates upon has relation not to any act of "further conveyance" of the property, but solely to the question of

its delivery either actual or constructive. The opinion utterly ignores the fundamental distinction in this bill of lading between "conveyance" and "delivery." They are separate, one must precede the other, and one begins when the other ends. In the case of delay at terminal points there is an intermediate stage, when the "conveyance" is ended, and the act of "delivery" not yet attended to. This, paragraph 11 is intended to define and govern.

The necessary effect of the construction contended for in the opinion of the Circuit Court of Appeals is to nullify this part of paragraph 11 of the bill of lading.

The Circuit Court of Appeals, in its opinion, cites in its support the case of McKinney vs. Jewett, 90 N. Y., 267. An examination of that case shows that it is clearly distinguishable from the case at bar. The language of the shipping bill or receipt in that case provided that the carrier should not be liable, as such, while the goods were "at any of their stations awaiting delivery," but during such period the carrier should be liable only as warehouseman. The facts in this case were that the hams, which were the subject of carriage in that case, arrived on Thursday. No notice of their arrival was given to the consignees although the consignees, through their cartman, inquired on Thursday and on Friday for the hams and was told that they had not arrived. As a matter of fact, they were then in the car which had arrived on Thursday and stood on the side track a short distance from the depot. On Saturday afternoon at half-past five o'clock notice of the arrival for the first time reached the consignees. The consignees having no time in which to remove their freight during the re-

maining hours of Saturday, waited over Sunday, and unloaded their hams on Monday, when they were found to have been seriously injured by heat and by the delay. The defendant relied upon the stipulation as to the reduction of liability under the terms of the shipping receipt that they should only be liable as warehousemen. The opinion, by FINCH, J., thus discusses this phase of that question:

"The defendant construes this stipulation to mean that from the moment of the arrival of the hams his liability as carrier ended, and from that time until the delivery on the following Monday he was responsible only as warehouseman. If that were so it would not excuse his negligence, but certainly property cannot be said to be 'awaiting delivery,' when its arrival is not only not announced, but actually denied; when its delivery is refused, and it is negligently withheld from the possession of the consignee. That was the case as to the carload of hams from their arrival on Thursday until at least the notice given on Saturday afternoon. It is to be observed that the stipulation depends upon two conditions; the property must be not only 'at the station' but also 'awaiting delivery.' This implies not only the arrival, but the completion of whatever on the part of the carrier is necessary to be done to leave the risk of further delay upon the consignee. The goods are 'awaiting delivery' only after the duty of the carrier is done, and he is entitled to remain passive 'awaiting' the action of the consignee."

* * * * * *

"It is said this construction nullifies the provision of the contract and leaves it nothing upon which to operate; that it must have some force, and it gets none if the common law liability remains unaffected. That rule properly applies only where two reasonable constructions are possible, and choice is to be made between them. In such event the law prefers the construction which gives the language effect. But no rule authorizes us to pervert the fair meaning of words, and to substitute, for something that is said, what is not said at all. We do not think the language of this shipping bill is doubtful or ambiguous. It means, as we

have stated, that after the goods have arrived, and the carrier has given notice to the consignee, at a time which furnishes reasonable opportunity for him to get them, then the carriers responsibility as such ends; and then, and not until then, are the goods "awaiting delivery." It is true, therefore, that the stipulation has little or no effect upon the character of the common law liability. It is possible that it has some, although very narrow and slight. The general rule holds the carrier as such until the end of a reasonable time for removal. It is possible that our construction would close his liability as carrier at the beginning of such reasonable time after notice. But we need not decide that here, for no facts in the case call for its determination.

"And that is the answer also to the further contention, that the trial court denied even this slender effect to the stipulation, and imposed the full common law liability. That is true, but we cannot see how it was at all material. There was no pretence that any of the injury to the hams occurred after the commencement of business hours on Monday morning. What the liability of the defendant was after that moment was of no consequence, and nothing in the case required its determination."

The damage to the hams was caused by the heat and the delay. The Court found that the carrier was guilty of negligence and that would create liability for the loss. The remarks of the Court, therefore, were unnecessary to the determination of the question of liability.

But the Circuit Court of Appeals construed the term "awaiting delivery" in a shipping bill, as synonomous with the term "awaits further conveyance." This ignores the essential differences between "conveyance" and "delivery." They are different acts and relate to difierent parts of the service. There could be no delivery to the consignee in the New York Case until there had been notice in some form to consignee. The element of notice had no connection

with the act of "conveyance" of the cotton. That might be entirely complete, regardless of notice.

Upon this question we submit that the Court clearly erred and the judgment directed should be set aside, there being no proof whatever of any negligence on the part of defendant.

II.

The contention of the defendant in error that the carriage of the cotton to Westwego was a deviation from the route designated in the bill of lading, is not well founded.

The contention was strongly urged in the lower Courts, and will doubtless be pressed in this Court, that the railway company cannot get the benefit of the stipulations of the bill of lading in view of the facts of this case.

The bill of lading provides that the cotton is "to be carried by the railway companies to the Port of New Orleans, La., and thence by Elder, Dempster & Co. S. S. line to the port of Bremen, Germany," etc. (Record, p. 79). At the time of the shipment and loss of the cotton the legal limits of the Port of New Orleans as a customs district, as defined by the Act of Congress, did not include Westwego (Record, p. 54). Indeed, the contention upon this branch of the case could not be more clearly stated than it is at this point in the record :

"MR. CLEVELAND: I suppose your proposition is that the Port of New Orleans is the actual place used as a harbor, irrespective entirely of custom?

"MR. TAGGART: In fact, yes.

"MR. CLEVELAND: Then do you concede that it was not within the Port of New Orleans, as defined by the Statutes of the United States in 1894—that is, that Westwego was not?

"MR. TAGGART: I concede this: that prior to March, 30, 1896, it was not within the designated limits of the port of entry, the customs district as defined by the Acts of Congress; that is, of course, subject to objection and exception as to its materiality."

The Circuit Court of Appeals overruled this contention of the defendant in error, saying:

"The plaintiff in error also made the point that by the bill of lading the cotton was to be delivered at the Port of New Orleans, and that, therefore, the defendant had no right to unload it at Westwego. It is true that Westwego was not, in 1894, within the boundaries of the Port of New Orleans, as defined in the Statute of the United States, but it was, so far as export cotton is concerned, that port in the well understood commercial and business sense, and was the port of New Orleans, when steamship companies rightfully expected to receive cotton from Texas for transportation to Europe. A kindred subject in regard to the limits of the port of New York was carefully considered in Devato v. 823 Barrels of Plumbago (D. C.), 20 Fed. Rep., 510; Sailing Ship Gorston Co. v. Hickie, 15 Q. B. Div., 580; Price v. Livingstone, 9 Q. B. Div., 679."

The same point was made, as the Court will recall, in the Clayton case, and it was not passed upon.

The rule invoked, that a carrier is liable, notwithstanding exemptions in the bill of lading, in case of deviation, is applicable only when such deviation has been from the *material* terms of contract.

The cases cited in the Courts below by the defendants in error sufficiently illustrate this distinction.

In Loomis vs. The Wabash, St. Louis and Pacific Railway Company (17 Missouri Appeals, 340), and in the *Devato case* (20 Federal Reporter, 510), the point named for delivery was the final destination of the goods, and an exact fulfillment of the terms of the contract might reasonably be deemed a matter of importance to the shipper or to his consignee.

In Graff vs. Blumer (9 Pennsylvania State, 114) the bill of lading provided that the goods were to be delivered not only, as stated in the plaintiff's brief (p. 40), "in Pittsburgh," but to "H. & P. Graff on presenting this receipt and payment of freight *at our warehouse* in Pittsburgh," and the fixing of the precise point of delivery may well have been for some specific purpose.

In the present case, however, the situation is quite different. New Orleans was not the destination of the cargo. Nothing was to be done with the cargo there except transfer it from the cars to the steamship for further transportation. At what precise point this was done was a matter of no importance to either shipper or consignee. The words "Port of New Orleans" were of no significance except as indicating the point of departure of the vessels of the designated steamship line. So long as the cotton was placed on one of the Elder-Dempster's Company's ships clearing from the port of New Orleans the material conditions of the contract were fulfilled, although the physical transfer of the cotton had been made from a point not within the boundaries of the legally created port.

As used in this bill of lading, therefore, the words "port of New Orleans" have no narrow or restricted meaning, but were simply to describe in general terms the point of trans-shipment. As was said by LUSH, J.,

in *Harrower vs. Hutchinson*, 38 L. J. (Q. B.), 185, they "must be read in a liberal sense, not merely as meaning those places which are technically and properly "known as ports, but all places where ships are accustomed to resort for the purpose of taking in "cargo. * * * The question whether it is a port "of loading is entirely irrespective of whether, by the "regulations of the country, a vessel can clear there "for this country. The definition that has been given "of a port is that it is a place at which ships arrive "for the purpose of loading their cargoes." That action was based on an insurance policy effected on goods at and from the port of Buenos Ayres and port or ports of lading in the Province of Buenos Ayres, to port or ports in the United Kingdom. The vessel having taken in part of her cargo at Buenos Ayres went to Lagunas de Padres to take in additional cargo. There was no artificial port or pier at the latter place, but vessels were required to anchor about a quarter of a mile from the shore and load by means of lighters. There was some little trade between Buenos Ayres and Lagunas, but none whatever between the latter place and Europe. A vessel bound for Europe and loading at Lagunas would be required to return to Buenos Ayres in order to get her clearance papers. It further appeared that the underwriters by whom the policy was issued had no knowledge whatever of the existence of such a place as Lagunas. It was the claim of the defendants that as a vessel would not have been allowed to go from Lagunas direct across the ocean it was not a port of loading within the meaning of the policy. This contention was overruled by the Court in the words above quoted.

In the case of Dock Company against Browne *et al.* (*a* B. & Ad., p. 43), we have a similar holding in the Court of King's Bench. The result of the decision is quite clearly stated in the marginal note, as follows :

"The port of Kingston-upon-Hull is mentioned in acts of parliament, charters and other documents, in two senses—first, according to the popular understanding as denoting a particular place ; and, secondly, in a larger acceptation, as comprising under one name a district of many places classed together for the purposes of the revenue, and of which Kingston-upon-Hull is the chief.

"The statute, 14 G., 3, c. 56, s. 42, which gives the Hull Dock Company a tonnage on ships coming into or going out of the harbour of Kingston-upon-Hull, or unlading or lading any of their cargo within the said port, must be construed as using the term "port" in the popular sense ; and not, therefore, as extending the burden of dock duties to places which, in point of local description, are without the port of Hull."

In Price vs. Livingstone (9 Q. B. D., 679) the question arose upon the construction of the terms of a charter party where the owners were entitled to an advance of one-third of the freight within eight days "from the final sailing of the vessel from her last port in the United Kingdom." The vessel was loaded at Penarth Dock, and was towed by a steam tug seven or eight miles, bringing her out about three miles into the Bristol channel. She there cast anchor, as the weather was threatening. While she was lying at anchor a storm broke her cables, and she ultimately ran ashore on Penarth beach, and the cargo was spoiled. The vessel had never been beyond the limits of the port of Cardiff as defined for fiscal purposes, but she had left what for commercial purposes is considered the port and had been out at sea. She went ashore within the limits of the port in

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its commercial sense. The owners sued for one-third of the freight, and the charterers resisted the claim on the ground that the vessel had never sailed from her last port in the United Kingdom. It was held, affirming the decision of LOPES, J., that the word "port" must be taken in its ordinary commercial sense, and that as the vessel had got out to sea without any intention of returning, she must be taken to have finally sailed from her last port, that her being driven back into it by the weather made no difference, and that one-third of the freight was payable.

JESSEL, M. R., passing on the question, says, among other things (p. 681):

"The word 'port' must be understood in its ordinary commercial sense. There are ports which, like the port of Cardiff, extend to miles for fiscal purposes, but they are not for commercial purposes to be treated as having that extent. This vessel was towed out to sea in the Bristol Channel, and had got seven or eight miles out of the port in its ordinary commercial sense."

In Sailing Ship "Garston" Co. vs. Hickie & Co. (15 Q. B. D., 580) it is held that the word "port" in a charter party is to be understood in its popular or business or commercial sense; it does not in such a document necessarily mean the port as defined for revenue or pilotage purposes.

This was an action brought to recover freight under the terms of a charter party which required freight to be paid "ten days after the final sailing of the vessel from her last port in Great Britain." In the opinion in this case, BRETT, M. R., discussing the meaning of the term "port" in the charter party, says:

"Therefore the word 'port' in a charter party does not necessarily mean an Act of Parliament pilotage port, or, which is the better word, pilotage district.

Therefore when you are trying to define the port with regard to which persons who enter into a charter party are contracting, you endeavor to find words which will shut out those things which you know they do not intend. What do they intend? They intend the port as commonly understood by all persons who are using it as a port, *i. e.*, for sailing to or from it with goods and merchandise. What persons are they? Shippers of goods, charterers of vessels and shipowners. What do all these persons in their ordinary language mean by a 'port'? What they understand by the word is the port in its ordinary sense, in its business sense, in its popular sense—*i. e.*, the popular sense of such persons. It is also the port in its commercial sense, for with them, business means commercial sense. Therefore, with the greatest deference to Mr. Justice WILLS, it seems to me that all these phrases are equally good, and that all in substance mean the same thing. He seems to have been inclined to substitute the words 'the legal port'; but with deference to him, in my opinion that would not do. The legal port may be fixed by an act of Parliament about which nobody knows anything. It must mean the port which such persons as I have mentioned would be dealing with, for the purpose of ships going to or from it carrying goods."

The argument was urged in the Courts below that it was intended by the shipper that he should have the benefit of such special protection from fire as would be afforded to him by the New Orleans Fire and Police Department, but this is fallacious. There is nothing in the record showing the legal limits of the port of New Orleans, and it cannot be assumed that they are co-terminous with the City of New Orleans proper, or those parts of it which have the benefit of police and fire protection. Doubtless there are many points within the legal limits of the port, and thus within the technical construction of the bill of lading contended for by the defendants in error, that are quite as remote as Westwego from the thickly settled

portions of the City. Had the theory now advanced been correct the shipper would have insisted on a bill of lading providing for trans-shipment, not in the "Port of New Orleans," but in the City of New Orleans, or at some particular pier or warehouse in that City.

But there is nothing upon which to found the claim of deviation, because the testimony shows that it was the general and established usage of the port for steamships to take delivery of export cotton at Westwego. Westwego was within the rule established by the authorities cited *ante*, a part of the commercial port of New Orleaas.

This abundantly appears from all the evidence in the case.

Mr. Le Blanc, agent of the Harrison Line of Steamships, testified (p. 26):

"We used to make engagements for cotton and when it came in we went there for it, but we had no other arrangements. Just like anybody else, we went to Westwego for it and everybody did; there was no special arrangement. * * * I should think the bulk of the cotton carried by the Harrison Line was received at other points than our own wharf. That custom was universal with the steamships landing here in New Orleans; that is, at the terminals of railways the steamship lines were all accustomed to receive cotton which was shipped over the various rail lines which was to go from the rail lines to the steamship lines. * * * The railway company at the point of shipment would make a through rate to the shipper in Liverpool, we will say, and that would be based upon a contract with the steamship company by which the steamship company would accept a certain proportion of that rate from the railway as its share of the carriage. Those are the kind of contracts or arrangements that I spoke of that were in force in 1894 between our line and the Texas and Pacific Railway Company, and it was in accordance with this custom, or an arrangement of that sort, that the reception of the cotton by the steamship lines was the terminus of the railway" (p. 27).

Mr. Warriner, agent of the Elder-Dempster Company Line, testified (p. 63):

"Q. After the building of the Westwego wharf it was customary, not only for your Steamship Line but for all other Steamship Companies to call at Westwego and get cotton? A. I suppose most of the lines did that; most of the lines went there.

"Q. And all export cotton that was required to be carried by rail came to the port of New Orleans and all that by the Elder-Dempster Line was delivered at Westwego, was it not, or substantially all, after this wharf was built, the cotton carried by the Texas & Pacific Railway Company? A. I do not know; I think there was a good deal carried that was delivered to the City front in New Orleans in the City.

"Q. I am speaking of export cotton for the Elder-Dempster Line? A. I should say most of it was delivered to Westwego.

"Q. But where there was a general contract for delivery at the port of New Orleans for cotton to be carried by the Elder-Dempster Line, Westwego was the point of delivery, was it not? A. Yes, sir."

Mr. W. J. Hammond, agent of the Hammond Line, testified (p. 58):

"Q. Now, then, that custom was about the delivery of cotton from the Texas & Pacific Railway Company here along the City front on this side—the New Orleans side—prior to the erection of the wharf; after the erection of the wharf at Westwego that was the recognized place of delivery for cotton, was it not? A. At Westwego—it was their terminal.

"Q. And the Steamship Line goes over there in order to get its cotton for export on its steamer? A. Oh, yes; they go there for a certain amount of cotton" (p. 61). * * *

"Q. After the erection of the dock it was recognized as commercially within the port of New Orleans—there were regular deliveries at Westwego? A. We called it New Orleans, although it was not officially New Orleans.

Q. And under the bills of lading for shipment by the Texas & Pacific it means New Orleans, and the Hammond and various lines of steamers received cotton continuously at Westwego, did they not? A. Yes, sir."

Mr. M. J. Sanders, agent of the West India and Pacific Steamship Company, testified:

"Q. Now after Westwego was opened then cotton shipped in that way (export cotton) was shipped to Westwego and there received by the steamship lines, was it not?

"A. As a rule, with the modification that I have already mentioned, that a certain quantity or number of bales must be there at one time for delivery" (p. 66).

Mr. Fornaris, agent of the French line, testified:

"Our line was accustomed to go to Westwego as well as to other wharves where freight was to be delivered, where it could get freight, whenever there was a sufficient quantity to justify our going there. Under a previous arrangement with the Texas & Pacific, we made an engagement with them that if they had so many bales we would go there to take them" (p. 76).

The fact that the Steamship Companies required that before going to Westwego there should be a certain minimum amount of cotton there ready for delivery, does not affect the question of the existence of a general custom or usage regulating shipments under a through bill of lading like the one in suit. It must as a rule have been a case that there was a sufficient amount of cotton ready to satisfy the requirements of the Steamship Companies, for the evidence is clear that practically all export cotton on through bills of lading was taken on board the steamers at Westwego, and only shipments for local points, or cotton shipped for foreign ports, on other than through bills of lading, were delivered in New Orleans proper.

Thus Mr. LeBlanc said (p. 30):

"I do not remember any shipments of the character I have described—through shipments—of cotton in 1894, where the cotton was delivered to our dock. Whatever shipments of cotton were made from our two

wharves in New Orleans were not exceptional shipments; they were smaller amounts for smaller roads and for spot shippers and for individual shippers."

Mr. Sanders said (p. 66):

"But I think that after the erection of the wharf at Westwego all cotton was loaded there—that is, all export cotton, so far as our lines were concerned. That is, the delivery of export cotton in the City of New Orleans along the front had about practically ceased."

Mr. Ross testified (p. 73):

"I know, however, that a large amount of export cotton, after the wharf at Westwego was built, was delivered to the steamship lines at Westwego.

"Q. And that the delivery of export cotton at any other point by the Texas and Pacific had almost entirely ceased, had it not. A. As far as direct arrangement between the railroad and ships are concerned.

"Q. As far as you know, the delivery of export cotton by the Texas and Pacific Railway at any other point had largely ceased, had it not? A. As far as any direct engagement with the Texas and Pacific Company on through bills of lading it did, but it did not cease as far as other export cotton was concerned."

There is no force in plaintiff's suggestion that because the shipment in this particular suit was only 200 bales it could not properly be delivered at Westwego under the arrangements between the railroad and the steamship company. No such narrow view is admissible under the conceded facts appearing here. The particular engagement of cotton, of which this shipment was a part, was for 1,000 bales (Plaintiff's Exhibit F, p. 95); and it further appears from the cotton reports offered in evidence by the defendants in error, that at the time when the 200 bales now in suit were received there were on hand at Westwego, also destined for Bremen, by Elder-Dempster Company's Line, over 3,000 bales of cotton (Record, p. 99. See, also, pp.

98, 100, 101, 102, 103 and 105. See, also, testimony of Wilkinson, p. 35; Perkins, p. 50).

Under these circumstances, the precise situation described by the shipping agents was presented; namely, that they would always go to Westwego to take export cotton, provided the shipment was of a sufficiently large quantity. The existence of the custom thus shown is sufficient justification for the delivery at Westwego. Under well-settled rules the fact that it may not have been known to the shipper (which, by the way, does not appear in this case) would not affect the question of the railway company's right to make such delivery.

In addition to the general recognition of Westwego by all the steamship lines going there for export cotton and making it the point of reception of such cotton from the Texas and Pacific Railway Company, under bills of lading of the form used in this case, there was express recognition of it as a part of the port of New Orleans by the State authorities. By Section 1681, Article 3, page 698, of the Statutes of Louisiana, a board of Harbor Masters was created to have jurisdiction over the movement of vessels in the port of New Orleans, with power to make regulations, collect harbor dues and to appoint deputies, etc. Under this statute the Board of Harbor Masters appointed a deputy to have charge upon the wharf at Westwego of the enforcement of their regulations, etc. They also adopted regulations governing the movement of vessels at the wharf and collected harbor dues from vessels going to Westwego, as in other parts of the port of New Orleans (Record, pp. 46-49).

In Hostetter vs. Park, 137 U. S., 30, certain merchandise was shipped from Pittsburgh on board a

barge, to be transported from Pittsburgh to New Orleans, and "to be delivered without delay in like good order at the port of New Orleans, Louisiana (the dangers of fire and unavoidable accidents excepted)." It appeared that when the tug having the barge in question, and other barges, in tow, had arrived safely at Mount Vernon, Indiana, and taken on board additional cargo, it left all of the other barges and went back up the Ohio River several miles with the barge in question, taking on additional cargo. Upon the return down the river an accident occurred, causing the loss of the cargo. The plaintiffs contended that this was a deviation, while the defendants claimed that it was a well-known custom for the owners of vessels to land their fleet at various points along the river, and there make a contract with shippers for the transportation of goods, and then detach from the fleet the barge or barges designated to receive such cargo, if it was not there, and send the barge or barges so designated to the place where the cargo might be stored, whether up, down, or across the river.

The Supreme Court held, BLATCHFORD, J., writing the opinion, that it was no deviation from the regular and usual course of the voyage to touch and stay at a port out of the course if such departure was within the usage of the trade, and said

"the same doctrine is applicable in the case of the bill of lading, even though the usage be not known to the particular shipper if it be established as a general usage."

III.

The judgment against the railway company in this case should be reversed and the cause remanded for a new trial.

Respectfully submitted,

RUSH TAGGART,

ARTHUR H. MASTER,

Counsel for Plaintiff in Error.

Office Supreme Court U. S.
FILED
DEC 2 1901
JAMES H. MCKENNEY,
Clerk.

No. 77.
App't to Br. for P. C.

Supreme Court of the United States.

OCTOBER TERM, 1901.

Filed Dec. 2, 1901.

No. 77.

THE TEXAS AND PACIFIC RAILWAY COMPANY,
Plaintiff in Error,

vs.

EMIL REISS, JAMES EDWARD REISS, FREDERICK REISS and HENRY JACQUES REISS,
Defendants in Error.

Appendix to Brief of The Texas and Pacific Railway Company, Plaintiff in Error.

C. G. Burgoyne, Walker and Centre Streets, N. Y.

I.

Remarks of Lacombe, J., in directing a verdict in favor of defendant on first trial, May 9, 1899.

BY THE COURT:

Very briefly I will state the method by which I arrive at my conclusion with regard to the bill of lading. The original liability of the common carrier that he shall respond as an insurer for property put in his hands, unless it is destroyed by the act of God, or public enemy, which originated many years ago, in what was then considered a sound public policy (and which public policy has still been persisted in in spite of many subsequent changes in the methods and circumstances of transportation) is an obligation which may, to a certain extent be relieved against by contract between the parties. The seeking of such relief is of course the basis of the various provisions in bills of lading. The Courts have held repeatedly that there are certain things the carrier cannot accomplish by any condition inserted in the bill of lading; and they have also held that there are other things that he may accomplish. In the particular case which we have in hand, undertaking to provide against the stringent liability of a common carrier, the carrier, or rather the successive carriers inserted certain conditions in the bill of lading and made them a part of the contract. They provided that all liability should terminate on the delivery of the property to the steamship, the steamship company, or on the steamship pier. Of course they had a right so to provide, and the law provided that much anyhow. Then they undertook to provide for a state of affairs where delivery to the steamship or the steamship company had not yet been fully accomplished. Thus we have in the third clause a provision that no carrier should be liable for loss or damage after the property is "ready for delivery to the next carrier," or its consignee. I doubt very much whether the carrier could make any such contract as that, or properly include any such condition, because it stipulates against his responding even for his own negligence; stipulates

against his responding for any loss or damage at all, no matter how incurred, after he has got the property stacked up and ready for delivery to the next carrier. However, it is not necessary to determine that question, because the carrier in this case has gone still further and provided for a case where not only has actual delivery not been accomplished, but where even actual tender of delivery to the next carrier has not yet been made. The eleventh clause provides that no carrier shall be liable in any other respect than as a warehouseman where the said property awaits further conveyance. In that clause there is no effort made to relieve him from all liability. The effort is to provide that, whereas he remains liable as a carrier so long as he is actually transporting the property and exposing it to all the vicissitudes to which property is exposed upon his road, weak bridges, misplaced switches, collisions, hot boxes, locomotive sparks and what not—remaining liable for all that, he simply stipulates that when he has reached the end of the transit and has got the property out loaded from the car on the resting place provided for it there, he shall not be liable except as a warehouseman. That is, he shall not be liable as an insurer but only for some failure of proper care in looking after the property. That is not an unreasonable stipulation. Of course the obligation of a carrier, as we look at it nowadays, seems to be a very onerous provision. He is required to respond as an insurer. It makes no difference if the fire, without his fault, caught premises next door to his and the wind swept it over to his premises, and the fire department was not able to stop it, he must respond all the same. It makes no difference if twenty or thirty men came there riotously and beat off his watchmen and burned the property up, the common carrier must still respond; and it is not unreasonable for him to relieve himself from liability as common carrier and to reduce his liability to that of warehouseman, when the characteristic functions which he discharges as common carrier have reached their conclusion. Therefore I see nothing unreasonable in this clause, and it seems to me that its natural interpretation is that it covers the condition of affairs when delivery not only has been completed—I mean delivery to the next carrier—but even prior to the time when delivery to the next carrier is actually proffered; when the property has been, by the first carrier, stacked up and in the position where he is about to deliver it, and all that awaits is the tender and put-

ting it into the hands of the next carrier. That leaves his liability in this case, as I understand it, the liability of a warehouseman.

As to the suggestion which is made here that there has been a divergence from the route stipulated in the bill of lading, upon the theory that the property was not carried to the port of New Orleans—upon the testimony as it stands I think that West Wego, within the meaning of this bill of lading, was a part of the port of New Orleans, commercially.

The question, therefore, only remains as to whether the testimony is sufficient to make out a case of lack of ordinary care on the part of the carrier, under all the circumstances, acting as warehouseman. Without going into the details of the testimony, it is sufficient to say I do not think that it does. There is some testimony here in regard to the apprehension of riotous disturbances, and the number of watchmen that were sent there from the detective agency, and it might be a question as to whether the company were reasonably prudent in the number of watchmen that were thus selected, if we had anything to indicate at all that the fire originated by reason of these disturbances. Then, on the other side, we have an engine on the dock there, some six hours before, and it was apparently in the habit of coming there every day, and if we had anything to connect the *locus* of the origin of the fire with the place where this locomotive was standing, very possibly there might be something in it; but there is a failure to connect the testimony which it is claimed shows neglect, with the subsequent catastrophe. I do not think, although the plaintiff has the burden of proof—and too heavy a burden should not be laid upon him where he is undertaking to show occurrences that took place at a location which is entirely within charge of the carrier, and about which he knows nothing—still at the same time he must go further than the plaintiff has in this case, certainly when testimony is available. Under the circumstances I think he has not made out a case sufficient to entitle him to a verdict.

II.

Opinion of Circuit Court of Appeals, December 7, 1899, reversing the judgment of the Circuit Court.

Reiss et al. v. Texas & Pacific Ry. Co., 98 Fed. Rep. 533.

SHIPMAN, C. J. The plaintiffs, who are cotton merchants in the city of Liverpool, and aliens, delivered on October 30, 1894, at Temple, in the state of Texas, to the defendant, a railroad corporation created by virtue of an act of congress, and a common carrier from places in Texas to New Orleans, 200 bales of cotton, to be carried by the defendant from Temple to the port of New Orleans, and thence by Elder, Dempster & Co.'s line of steamships to Bremen, Germany. The conditions of the bill of lading which was issued for this cotton were divided into two classes, one relating to the service until, and the other relating to the service after, delivery at the port of New Orleans. All the bales arrived a West Wego on November 6, 1894, and 160 bales were unloaded on the next day, and the remaining 40 were also unloaded, but the day of unloading does not appear. All the bales were placed on the defendant's wharf, 120 bales at one point, and each lot of 40 bales at separate and different points. All the cotton was destroyed by fire on the evening of November 12th. At this time the wharf was loaded to its full extent with cotton, there being on the wharf over 20,000 bales, and 206 cars containing 8,000 bales. West Wego is in the parish of Jefferson, on the west bank of the Mississippi, opposite the upper end of the city of New Orleans. Before the construction by the defendant of a wharf and terminals at this point, it delivered all export cotton at its freight depot and warehouse on the east side of the river, in New Orleans proper. The West Wego structure was completed in the early spring of 1893, and thereafter all export cotton coming from Texas was delivered to the steamship companies at West Wego, which was the port of New Orleans for export cotton in the popular business and commercial sense, though it was not included by statute of the United States in the customs district or port of entry of New Orleans until March 30, 1896. The conditions of the bill of lading which are important in this case " with respect to the service until delivery at the port of New Orleans " are as follows :

"(1) No carrier or party in possession of all or any of the property herein described shall be liable for any loss thereof or damages thereto by causes beyond its control, or by floods, or by riots, quarantine, strikes, or stoppage of labor, or by leakage, breakage, chafing, loss in weight, changes in weather, heat, frost, wet, or decay, or from any cause if it be necessary or is usual to carry said property upon open cars."

"(3) No carrier shall be liable for loss or damage not occuring on its own road, or its portion of the through route, nor after said property is ready for delivery to the next carrier or to consignee."

"(11) No carrier shall be liable for delay, nor in any other respect than as a warehouseman, while the said property awaits further conveyance; and, in case the whole or any part of the property specified herein be prevented by any cause from going from said port in the first steamer of the ocean line above stated leaving after the arrival of said property at said port, the carrier hereunder then in possession is at liberty to forward said property by succeeding steamer of said line, or, if deemed necessary, by any other steamer.

"(12) This contract is executed and accomplished, and all liability hereunder terminates, on the delivery of the said property to the steamship, her master, agent or servants, or to the steamship company, or on the steamship pier at the said port; and the inland freight charges shall be a first lien, due and payable by the steamship company."

The defendant was in the habit in 1894 of making contracts with divers steamship companies, including Elder, Dempster & Co.'s line in New Orleans, by which they were to transport to European ports cotton received by them at the defendant's wharf at West Wego. The particular contract under which Elder, Dempster & Co. were to transport the plaintiff's bales was dated October 19th, 1894, and was in the form of a letter to the agents of the steamship company from the agent of the defendant, saying that he had engaged 1,000 bales of cotton for shipment by their line to Bremen at a specified rate. The course of business between the steamship lines and the defendant was stated in Texas & P. Ry. Co. vs. Clayton, 28 C. C. A. 142, 84 Fed., 305, and was as follows:

"This wharf was at the terminus of a branch of the defendant's line of railway on the bank of the Mississippi River, and was built out over the river far enough so that cars could be run upon the tracks in the rear of the wharf and unloaded, and vessels come to the front of the wharf and receive the freight thus unloaded. It was controlled exclusively by the defendant, and used by it for the temporary storage of freight of all kinds brought over its railway and awaiting delivery to the consignees or for transportation by vessels. * * * Upon the shipment of the cotton in Texas, bills of lading would be issued to the shipper. Thereupon the cotton would be loaded in cars of the defendant, and a waybill giving the number and initial of the car, the number and date of the bill of lading, the date of the shipment, the names of consignor and consignee, the number of bales forwarded on that particular waybill, the marks on the cotton, the weight, etc., would be given to the conductor of the train bringing the car to West Wego. Upon the receipt of the waybill and car at West Wego, a skeleton would be made out by the defendant's clerks at West Wego, for the purpose of unloading the car properly, containing the essential items of information covered by the waybill, and the date of the making of the skeleton. When this skeleton had been made out, and the car had been sidetracked at the rear of the wharf, the skeleton would be taken by the defendant's check clerk, and he would proceed with a gang of laborers to open the car. The cotton would then be taken from the car, examined to see that the marks corresponded with the items upon the skeleton, and deposited in one of the sheds upon the wharf designated by the check clerk, and the check clerk would mark upon the skeleton the location of the cotton The sheds were subdivided into fifteen sections, and the location of the cotton was left to the check clerk. The skeleton would then be transmitted to the general office of the defendant, and the defendant would make out a 'transfer sheet,' containing substantially the information contained in the waybill, and transmit the transfer sheet to the steamship line. The steamship line, upon receiving the transfer sheet, understood that cotton for their vessels was on the wharf at West Wego, and would collate the transfers relating to such cotton as

was destined by them for a particular vessel, return the transfer sheet to the defendant, and advise defendant what vessel would take the cotton. Thereafter the steamship company, when it was ready to take the cotton, would send the vessel, with their stevedores to the wharf, the defendant's clerk would go with the master of the vessel, and identify and count out the particular lots of cotton designated for his vessel, the master would O. K. them, and the stevedores would thereupon take the cotton and put it on board the ship. Before the cotton left the wharf, the defendant would obtain a receipt for it from the master of the ship."

No transfer sheets respecting the cotton in suit, and no notice of its arrival at West Wego, were ever sent to the steamship company. A practice has grown up since the fire for a vessel to receive cotton which had arrived in accordance with the bill of lading for which the ship had room, although the steamship company had not received transfer sheets; that is, to receive any cotton which entirely corresponded with the bills of lading for which it had room, and receipt for it. This cannot be stated as at any time a general usage. The case turned in the circuit court upon the construction of clause 11 of the bill of lading, and the circuit Judge was of opinion that the term "awaiting further conveyance" meant not only when the next carrier was about to take possession, but when the property had been unloaded from the cars, and placed in proper position for future transportation, although notice of arrival or tender of delivery has not been made. He therefore directed a verdict for the defendant, and to review the judgment which was entered upon the verdict this writ of error was taken.

The subject of the obligation of a carrier at common law towards property while it is in transportation to its ultimate destination, and is to be taken by a connecting carrier, was considered in Michigan Cent. R. Co. v. Mineral Springs Mfg. Co., 16 Wall. 318, 21 L. Ed. 297; Texas & P. Ry. Co. v. Clayton, 173 U. S., 348, 19 Sup. Ct. 421, 43 L. Ed. 725; *Id.*, 28 C. C. A., 142, 84 Fed., 305; and Goold v. Chapin, 20 N. Y., 259. In the first-named case it is said:

"In such cases it is the duty of the carrier, in the absence of any special contract, to carry safely to the end of his line, and to deliver to the next carrier beyond; and that public

> policy requires that the rule should be enforced, and will not allow the carrier to escape responsibility at the end of his route without delivery or an attempt to deliver to the connecting carrier."

Furthermore, in the like absence of a special contract, it was said in the Clayton Case in this court:

> "Although the second carrier, after notice and a request to do so, has neglected for an unreasonable time to receive the goods, the first carrier must, to exonerate himself as an insurer, in some way clearly indicate his renunciation of the relation of carrier."

The mere unreasonable delay of the connecting carrier is not sufficient to convert the first carrier into a warehouseman. This renunciation is ordinarily shown by notice to the connecting carrier that the property will be kept or stored at its risk until compliance with the request to remove. Texas & P. Ry. Co. Cases, *supra*. This rule of law being admitted, it is said by the defendant that a special contract was clearly stated in its bill of lading, by which it became a warehouseman from the time that the cotton was unladen and piled upon the wharf to await cartage to the steamship. It is not claimed that the facts bring the carrier's liability within clause 3 of the bill of lading, which says that the liability shall end after the property "is ready for delivery" to the next carrier, for it is conceded that the goods are not awaiting delivery before any notification of their arrival to the connecting carrier. McKinney v. Jewett, 90 N. Y. 267. It is, however, insisted that the fair construction of clause 11 is that, when the act of transportation of the cotton to the wharf at West Wego has been accomplished, and it has been stacked on the wharf, and "is awaiting further action in the way of notification and advice to the succeeding carrier," it awaits further conveyance. By this construction the parties substituted an immediate cessation of the liability of a carrier, and the assumption of the liability of a warehouseman for the liability imposed by the common law, and doubtless they were at liberty to make a contract of limitation which will be enforced if the language of the bill of lading clearly indicates that such was their intention. In order to justify the defendant's construction, the claimed extent of the departure from the

implied contract of the common law must clearly appear in the language which is used in the special contract. The clause, "no carrier shall be liable for delay," when applied to the facts in this case, meant that the defendant should not be liable for the delay of the steamship company, but delay would not occur until it knew or had heard of the time of arrival of the cotton. The same idea of notification to the connecting line must also run through the entire paragraph, and, while the term "awaiting further conveyance" literally means "awaiting the time when the next carrier shall take the property in hand," it seems improbable that it was the intent of the language that the liability of the carrier should terminate upon the deposit of the property upon the wharf. The language is too indefinite to support the conclusion that notice to the connecting line was not a prerequisite to the change of liability to that of a warehouseman. It may well be that such change would take place when the property was awaiting conveyance by the connecting line which had been notified to receive and convey, but until then it is not awaiting conveyance; it is awaiting the action of the first carrier. The term must mean awaiting conveyance by the person upon whom the duty of conveyance devolved, and no such duty devolved until notice of the arrival of the property had been given. The provisions of the bill of lading in Draper v. Canal Co., 118 N. Y. 118, 23 N. E., 131, which was construed to free the carrier from liability from the time the property reached the point of destination, were far more definite than those in this case. In the direction of a verdict for the defendant, when no notice of the arrival of the property had been given to the next carrier, or had been received by it, we think that error was committed.

The plaintiff in error also made the point that by the bill of lading the cotton was to be delivered at the port of New Orleans, and that, therefore, the defendant had no right to unload it at West Wego. It is true that West Wego was not, in 1894, within the boundaries of the port of New Orleans, as defined in the statute of the United States, but it was, so far as export cotton is concerned, that port in the well understood commercial and business sense, and was the part of the port of New Orleans where steamship companies rightfully expected to receive cotton from Texas for transportation to Europe. A kindred subject in regard to the limtts of the port of New York was carefully considered in Devato v. 823 Barrels of Plumbago (D. C.) 20 Fed., 510; Sailing Ship Garston Co. v. Hickie, 15 Q. B. Div., 580; Price v. Livingstone 9 Q. B. Div.

679. If the circuit judge should be of opinion that the liability of the defendant was that of a warehouseman, the plaintiff asked to go to the jury upon the question of negligence of the defendant as a warehouseman in not taking larger precautions against fire when an accidental fire might reasonably have been expected. Inasmuch as we are of opinion that the defendant was not a warehouseman, any expressions upon the subject of neglect would be *obiter*. The judgment of the circuit court is reversed with the costs of this court, and the case is remanded to that court for a new trial.